APPENDIX A — RULE 23 ORDER OF THE APPELLATE COURT OF ILLINOIS FOR THE FIFTH DISTRICT DATED AND FILED JUNE 19, 2002

NO. 5-00-0841

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

LOUIS I. MUND and COLUMBIA GOLF CLUB, INC.,

Plaintiffs-Appellees,

v.

REBECCA BROWN, as Special Representative for Ruth S. Reeves, Deceased,

Defendant-Appellant.

Appeal from the Circuit Court of St. Clair County.

No. 00-CH-95

Honorable John M. Goodwin, Jr., Judge, presiding.

RULE 23 ORDER

This case presents a simple question: Who holds rightful title to a piece of real estate known as Lot 7A?

Rebecca Brown, special representative for Ruth Reeves, now deceased, appeals from the grant of a summary judgment

in favor of Louis Mund in an action to quiet title under sections 13-109 and 13-110 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/13-109, 13-110 (West 1998)). Brown wants us to overturn a trial judge's determination that Mund is the legal owner of Lot 7A.

The piece of property in question was a part of a 1982 real estate transaction that became the source of protracted, and somewhat delphic, federal litigation, launched in the early nineties by Ruth Reeves against the appellees. Reeves lost the case prior to her demise. Many of the "facts" that Brown now pleads and asserts as reasons for a genuine factual dispute formed the basis of the federal court pleadings that were litigated years ago. Those "facts" are resurrected here as counterclaims and affirmative defenses.

Brown's counterclaims and affirmative defenses obscure the simple issue that confronted the trial judge and resulted in some lower court findings superfluous to the quiet title action. Those findings needlessly complicate the arguments raised on appeal and are unnecessary to a review of the holding that Mund became the legal owner of Lot 7A pursuant to his payment of taxes with color of title. The question that we decide in this case is whether reasonable minds could differ over the material facts legitimately at issue in the quiet title suit. More specifically, we must determine whether reasonable minds could differ over these facts: Did Louis Mund and Columbia Golf Club, Inc., actually possess Lot 7A for over seven successive years? If so, was that actual possession under a claim and color of title made in good faith? Finally, during that time of actual possession, did Mund and the corporation pay all the taxes

legally assessed on Lot 7A? If reasonable minds would not differ when assessing these facts, a summary judgment in favor of the appellees was properly rendered and the legal owner of Lot 7A was properly determined.

As simple, and plainly beyond dispute, as these facts may seem to be, Brown insists that they need to be litigated and decided by a jury. We think it instructive to set forth verbatim the points that Brown raises to support a reversal and a remand for a jury trial over the ownership of Lot 7A. The points we are asked to address stray far beyond what was placed at issue by the filing of the action to quiet title. The following are the points, absent cited authorities, that Brown considers germane to the question of who is the legal owner of Lot 7A:

> "I. The circuit court erred under de novo review when granting summary judgment in favor of plaintiffs on counts I and II of plaintiffs' second amended complaint when material issues of fact existed as to the running of a seven[-]year period under [sections 13-109 and 13-110 of the Code]
>
> a. Standards for summary judgment
>
> * * *
>
> b. Interruption of seven[-]year period with federal lawsuit filed in 1998
>
> * * *

c. Seven years hadn't run from when plaintiffs first paid taxes and when plaintiffs filed suit

* * *

d. Color of title not gained in good faith

* * *

e. Admissions and denials in Ruth Reeve's [*sic*] answer should not have been construed against her

* * *

f. Deposition testimony of Ruth S. Reeves in cause 94-1000-PER did not constitute binding judicial admissions

* * *

g. Limitation period of counterclaims affecting summary judgment

* * *

h. Unreasonable to conclude Ruth Reeves would not wait from 1982 to 1993 to know something was happening with the Columbia Golf Course

* * *

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i. Trial court erroneously found that it was unreasonable to conclude that Ruth S. Reeves would not know about a note on which G.R.R. [Investment Company, Inc.] was obligated

* * *

j. Trial court erroneously found that exhibits 8 and 9 attached to Timothy Reeves' affidavit [*sic*] did not preclude summary judgment

* * *

k. The court failed to strike the affidavit of Louis I. Mund

* * *

l. Trial court failed to consider controverted facts

* * *

II. The trial court erred when it dismissed with prejudice defendant's counterclaims and had stricken defendant's affirmative defenses

a. The court erroneously entered summary judgment on counts I and II of plaintiffs' second amended complaint and also erroneously dismissed defendant's counterclaims when clear issues of material fact existed

* * *

b. The trial court erroneously found that prior decisions barred the counterclaims

* * *

c. [Section 13-206 of the Code (735 ILCS 5/13-206 (West 1998))] is the proper limitation period for written contracts and the court incorrectly found the limitation period had run

* * *

d. [Section 13-206 of the Code] is the proper limitation period for written contracts and the statute could not have run if the seventh circuit decision does provide the date of notice

* * *

e. [Sections 13-102, 13-207, and 13-205 of the Code (735 ILCS 5/13-102, 13-207, 13-205 (West 1998))] are not applicable statutes of limitation to the instant lawsuit

* * *

f. Summary judgment and correspondingly [*sic*] dismissal under [section 2-619 of the Code (735 ILCS 2-619 (West 1998))] should not have been granted since plaintiffs did not adequately plead their causes of action and affirmative defenses

* * *

g. Proposed findings of fact and conclusions of law filed by plaintiffs should have been stricken

* * *

h. The trial court failed to reference the counterclaims [for] breach of contract and ejectment in its findings of fact and conclusions of law and the denial of live witnesses also affected the ruling on the [section] 2-619 dismissals"

Brown sets forth the following questions in that portion of the brief that calls for "Issues Presented for Review":

"1. Did the Trial Court err in granting Summary Judgment on Plaintiffs-Appellees' Quiet Title Claims when:

a. All the pleadings, admissions, affidavits, and depositions were not strictly construed against the Plaintiffs?

b. There was an interruption of the seven[-]year period for adverse possession by a Federal Lawsuit?

c. Seven years hadn't run from the time real estate taxes were paid by the Plaintiffs?

d. Color of Title was not gained in good faith?

e. Admissions and denials weren't construed in Ruth S. Reeves' favor?

f. Deposition testimony of Ruth S. Reeves from Federal Cause 94-1000-PER was used against her, despite Federal Cause 94-1000-PER being Voluntarily Dismissed and issues of fact resulting from her testimony?

g. Counterclaims were dismissed based On Statutes Of Limitations and correspondingly Summary Judgment was granted on Plaintiffs' Quiet Title actions for adverse possession?

h. It was concluded that Ruth S. Reeves should have known something about the Columbia Golf Course in 1982?

i. It found it was unreasonable for Ruth S. Reeves not to know about a Note on [which] G.R.R. Investment Inc. Co. [*sic*] was obligated?

j. It found Exhibits 8 and 9 attached to Timothy Reeves' affidavit not to be relevant?

k. It failed to strike the affidavit of Louis I. Mund?

l. It failed to consider controvertred [*sic*] material facts[]?

2. Did the Trial Court err in dismissing with prejudice the Defendant-Appellant's three Counterclaims and striking the Defendant-Appellant's Affirmative Defenses when:

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a. Summary Judgment was entered on Counts I and II of Plaintiffs' Second Amended Complaint and Defendant's Counterclaims were dismissed, despite issues of material fact?

b. It found Counterclaims were barred by previous decisions?

c. It found the Limitation Period under [section 13-206 of the Code] had expired?

d. It found [section 13-206] had expired pursuant to the Seventh Circuit providing a Date of Notice?

e. Multiple Statutes of Limitations were applied?

f. Plaintiffs did not adequately plead any Causes of Action and [*sic*] any Affirmative Defenses?

g. Plaintiffs' proposed Findings Of Fact And Conclusions Of Law weren't stricken?

h. It failed to reference certain Counterclaims and denied live witnesses[']testimony?"

As complicated and factually contested as Brown's multifaceted arguments may seem to make this case, the core facts of the quiet title action were simply irrefutable to the sound and reasonable mind. We can start with actual possession, for it was virtually uncontested. Mund and Columbia Golf Club, Inc., have possessed Lot 7A since 1982.

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Brown asserts that a genuine issue of material fact exists over whether Mund and Columbia Golf Club, Inc., possessed Lot 7A under a claim and color of title made in good faith. The basis of this assertion is set forth in a lengthy and very detailed set of affirmative defenses and counterclaims, the gist of which allege that Lot 7A, along with other property obtained from Ruth Reeves, was possessed unlawfully through fraud, forgery, and deceit. We believe that the only *reasonable* conclusion to draw from the evidence submitted in support of the summary judgment motion is that Mund purchased Lot 7A, along with other property surrounding it, in 1982. Loan and mortgage documents, together with a closing statement evidencing the transfer of purchase price monies to the seller, defy any other reasonable factual conclusion.

While Brown seems to think that the voluntary dismissal of a lawsuit in which sworn deposition testimony has been given relieves the deponent of sworn answers, we think it fair to recognize that Ruth Reeves admitted, under oath, prior to her death, that Lot 7A was sold in 1983 and that she signed the document of sale.[1] Moreover, after the dates on the closing

1. We choose to address Brown's argument regarding Reeves' federal court deposition testimony by way of this footnote because it instructs on the difficulty that we have had, and we suspect the trial judge had, with some of the rather novel propositions Brown tenders for decision. Brown argues that because Reeves voluntarily dismissed the federal lawsuit that led to her sworn deposition testimony, the sworn deposition testimony should be treated as a nullity — *i.e.*, as if it never happened. This proposition is supported by citation to authority that has prevented the use of *res judicata* or collateral estoppel based upon a voluntary dismissal.

(Cont'd)

documents, Mund and Columbia Golf Club, Inc., treated the property like it was their own, and at the same time, Ruth Reeves treated the property like someone who had sold it, rather than someone who owned it. Their respective approaches to the property lasted for well over a decade before Ruth Reeves filed her federal lawsuit.

Mund's affidavit claims that Mund paid the property taxes on Lot 7A since its asserted purchase in 1982. Mund presented the tax bills made out to him and Columbia Golf Club, Inc., to support his claim for the years 1990, 1992, 1993, 1994, 1995, 1996, 1997, and 1998. Neither Ruth Reeves

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(Cont'd)

Ergo, we are told that the trial judge should have completely ignored the sworn testimony by Ms. Reeves that she sold Lot 7A and signed the sale document.

While litigants cannot use a voluntary dismissal to foreclose the future litigation of legal issues, the voluntary dismissal of a lawsuit cannot be said to rewrite history or to erase admissions made under penalty of perjury. We know of no law that provides such relief to party deponents caught in damning admissions harmful to their lawsuits. We are not prepared to provide for such an escape hatch by the acceptance of Brown's argument.

We note, in passing, that Brown does not want us to treat Ruth Reeves' deposition testimony as if it never existed. Brown wants us to consider it a nullity only as to the damning admission her deceased made under oath. In the same argument in which we are asked to treat the deposition testimony as a nullity, Brown argues extensively about facts established during Ruth Reeves' sworn deposition testimony. Brown assails the trial judge for failing to consider "the crux of the deposition."

nor her special representative nor anyone acting for them has ever produced documentation that a tax bill for Lot 7A was ever sent to Reeves during this time frame. No one has ever claimed that anyone other than Mund paid the taxes assessed on this parcel for the seven successive years evidenced by the tax bills.

Brown raises several arguments, none of which alter the virtually undisputed fact that Mund paid all the taxes legally assessed on Lot 7A for seven successive years and then some. First, she asserts that Ruth Reeves' federal lawsuit, filed in 1998, interrupted any continuous period of adverse possession. This proposition is based upon a citation to a case that does not exist, at least not in the book or at the page to which Brown directs us. Nevertheless, Reeves' *unsuccessful* lawsuit, barred by the statute of limitations, did nothing to interrupt Mund's actual possession of Lot 7A, and we are not prepared to hold that the filing of a spurious lawsuit, lacking in merit, will toll, or interrupt, the possession called for in order to become the legal owner by the payment of taxes under color of title. Even if there is a case that stands for the proposition that continuous adverse possession can be broken by someone merely filing a lawsuit that contests ownership, regardless of the lawsuit's merit, which is what Brown seems to contend, we decline to follow it. We hold that the filing of a lawsuit that is clearly out of time will not work to toll the length of the possession necessary to employ this particular statutory means of quieting title. Any other conclusion would render the statute meaningless, for anyone with a foreclosed claim to title could break possession's successive chain by filing a suit that asserted an ancient and

stale claim, with no basis for recovery. Thereafter, they could file a suit to quiet title that asserted the prior spurious suit's interruption of continuous adverse possession.

Next, Brown argues that Mund filed the suit to quiet title prematurely, months before seven years had passed after his first payment of taxes on Lot 7A. This argument draws upon the presence of a 1990 tax bill attached to Mund's affidavit and the absence of a 1991 tax bill. Brown concludes from the gap in tax bill documentation that "the tax bills show no taxes were paid from June 14, 1991[,] to June 25, 1993." In fact, the missing tax bill cannot tell us anything about whether taxes were paid or not paid during this time period in 1991, 1992, and 1993. While it is true that no one tendered the 1991 tax bill for Lot 7A, and thus there was no documentary proof of where the bills were sent and whether they were paid between June of 1991 and June of 1993, Mund maintained under oath that he paid the taxes for that period of time, as well as all of the other documented years. We can easily, and reasonably, infer from the later bills that someone clearly paid the taxes for this period of time. It is also reasonable to infer that the person who was in actual possession and enjoying Lot 7A's use at the time, and who had paid all the taxes before and after that time, was indeed the taxpayer, as claimed. We note that Brown does not claim that Ruth Reeves paid the taxes during the questioned time period. All that Brown claims is that Reeves "also paid some taxes." In support of this claim, Brown attached an exhibit to the affidavit of Timothy Reeves that establishes the payment of property taxes on another parcel of property.

Under the circumstances presented, we think it decidedly reasonable for the trial judge to conclude that reasonable minds would not differ and that no genuine issue of fact existed about whether Mund paid the taxes for seven years prior to filing the quiet title suit.

Brown raised several counterclaims in her answer to the quiet title suit. A review of those counterclaims reveals that none of them raise a genuine issue of material fact about the ultimate issue at hand — whether Mund became the legal owner of Lot 7A by virtue of his payment of real estate taxes on the parcel. The first counterclaim tries to resurrect a time-barred cause of action for breach of contract. The second counterclaim sounds in ejectment, which rests upon the existence of a fact that facts underlying Mund's cause of action belie. We have already concluded that there are no facts giving rise to a genuine dispute over Mund's legal ownership by virtue of the payment of taxes under color of title. Therefore, the unlawful possession necessary to maintain an action for ejectment does not exist. The third counterclaim tries to assert a civil rights action pursuant to section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983 (1994)), alleging that filing a quiet title action amounts to an act under color of state law. Neither Mund nor his corporation acted under color of state law for the purpose of a section 1983 civil rights action, by filing a quiet title lawsuit in a state court. The counterclaim fails to state a civil rights cause of action on its face.

We address the questions raised in the first counterclaim in more detail. Brown seeks to raise a cause of action for breach of contract. She alleges that Mund breached a 1982

contract for the sale of land, a contract for the sale of much more property than just Lot 7A. The breach is alleged as Mund's failure to pay $1.4 million for all of the property, including the parcel known as Lot 7A. While Lot 7A, the subject matter of this quiet title action, was a part of the contract, the counterclaim is not confined to damage sustained by an alleged failure to comply with the promise to purchase it. In a simple action to quiet title to this parcel, Brown counters by claiming a breach of contract that requests far more than the damages that resulted from an alleged failure to pay for Lot 7A. Brown wants a judgment for compensatory damages in excess of $50,000, preliminary injunctive relief for possession of all of the land conveyed under the contract, and the return of the property known as Land Trust 5048, the Columbia Golf Course, and Lot 7A. She asks for this relief only if Mund and Columbia Golf Club, Inc., cannot pay in full the current fair market value of all of the land still possessed and all of the monies received from any sale of those lands. While a counterclaim over the sale of Lot 7A might arise out of this quiet title action, clearly the counterclaim, as alleged, far exceeds the kind of bearing that a claim countering an original complaint must have to the issues raised in that complaint. The trial judge properly dismissed the counterclaim for breach of contract.

We note that Brown, in asserting this counterclaim, seeks relief that could only be granted if Ruth Reeves and Mund had, in fact, entered into a valid contract for the sale of Lot 7A. Thus, the counterclaim is consistent with Mund's claim that Lot 7A was lawfully acquired through a contract for the sale of land. However, it is totally at odds with

Brown's claims that the contract never existed and that the instrument that set forth its terms bears the forged signature of Ruth Reeves.

Even if we were of a mind to allow Brown to obtain relief under the terms of a written instrument that Brown excoriates as nothing more than a bogus fraud, the fact remains that an action for breach of contract under the instrument's terms became time-barred years ago.

Brown addresses the stale and aged nature of the claim by arguing that the statute of limitations was tolled under the discovery rule. See *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 360-61, 657 N.E.2d 894, 898 (1995). She maintains that a question of fact exists as to when Reeves first became aware, or should have become aware, of a contract breach. She relies upon a March 4, 1993, letter requesting a deed on Lot 7A as a "reaffirmation of the debt" and, hence, the date when the statute of limitations commenced running. The letter did not reaffirm the existence of a debt. To the contrary, it asserted that all payments due had been made in accelerated fashion, and it requested the conveyance of the title to Lot 7A.

Again, we are confronted with whether there is a *genuine* issue of fact as to when Ruth Reeves should have become aware of nonpayment under the contract. In other pleadings, we are told that Ruth Reeves did not sign the document of sale and did not receive anything of value from Mund. A review of the alleged written contract reveals payment terms that required interest payments to commence on September 1, 1982. Two $200,000 principal payments were to be made on

or before September 1, 1987, and September 1, 1989. The alleged breach is for the nonpayment of principal and interest amounts.

If Reeves did not receive interest payments on September 1, 1982, she should have been aware on September 2, 1982, that Mund had breached the payment terms of the land sale contract. Every day thereafter that further interest payments were not forthcoming was another day upon which a breach occurred. The continuing failure to pay for the conveyed land was something the seller should have discovered long before March of 1993. When Reeves did not receive a $200,000 principal payment on September 1, 1987, she should have been aware of that fact. She should have become aware of another breach of contract on September 2, 1989, if, as she has alleged, Mund never tendered money for any of the property in question under the contract. A bare assertion that Reeves remained ignorant of Mund's failure to comply with the contract's payment terms until March of 1993 is not a reasonable assertion. It fails to present a genuine factual dispute over which reasonable minds could differ.

Finally, Brown raised several affirmative defenses, none of which had any bearing on this action to quiet title by virtue of possession coupled with seven successive years of real estate tax payment. The gist of every affirmative defense finds reason in an assertion that Mund never lawfully owned or possessed Lot 7A by virtue of a legitimate land sale purchase. Even if that assertion was true, despite documentation that strongly suggests otherwise, Mund was not asserting the

original land sale purchase as his basis for being declared the lawful owner of Lot 7A.

Brown raises the affirmative defenses of "Fraud," "Statute of Frauds," and "Avoidance of Contract." The allegations under the "Statute of Frauds" affirmative defense will suffice to demonstrate the lack of nexus to this lawsuit. Brown alleges:

> "Plaintiffs-Counterdefendants have no enforceable contract for the Columbia Golf Course, Land Trust 5048, and Lot 7A since any contracts (See Exhibits 2 and 6) have the name of Ruth S. Reeves forged, and as such there is no viable signature of the party to be charged."

We are left to wonder what this has to do with a claim to title under the statutory provision that provides for ownership rights by virtue of real estate tax payments over seven successive years. We reiterate that the facts were virtually undisputable that Mund and the corporation were in actual possession, under claim and color of title, made in good faith, while they paid the taxes on Lot 7A for seven successive years. Whether or not Mund and Columbia Golf Club, Inc., had an enforceable contract for Lot 7A or not, they subsequently did what was necessary to be declared the legal owner of Lot 7A.

For the foregoing reasons, we affirm the rulings of the court below. We are fully aware of the fact that the reasons we affirm the summary judgment in favor of Mund and Columbia Golf Club, Inc., differ in many respects from the

reasons the trial judge stated for the results that he reached. However, because our review is *de novo*, we may affirm the trial court's judgment based upon any reasons apparent from the record before us on appeal. *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 502, 520 N.E.2d 37, 39 (1988).

Affirmed.

KUEHN, J., with GOLDENHERSH, J., concurring.

WELCH, J., dissenting:

I take issue with the majority's following statement:

> "[Defendant's] counterclaims and affirmative defenses obscure the simple issue that confronted the trial judge and resulted in some lower court findings superfluous to the quiet title action. Those findings needlessly complicate the arguments raised on appeal and are unnecessary to a review of the holding that Mund became the legal owner of Lot 7A pursuant to his payment of taxes with color of title." Order at 2.

Defendant's counterclaims and affirmative defenses are part and parcel of the issues confronting the trial judge, for if Mund acquired possession of Lot 7A through fraud or forgery, he did not acquire color of title *in good faith* as required by sections 13-109 and 13-110 of the Code of Civil Procedure (Code) (735 ILCS 5/13-109, 13-110 (West 2000)).

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Defendant's counterclaims and affirmative defenses raise genuine issues of material fact as to whether Mund acquired color of title in good faith.

In the face of these counterclaims and affirmative defenses, a summary judgment in favor of Mund is not appropriate. Defendant argues on appeal that the trial court erred in dismissing her counterclaims and striking her affirmative defenses. The majority finds that these arguments "needlessly complicate" the appeal and are "unnecessary to a review of the holding that Mund became the legal owner of Lot 7A pursuant to his payment of taxes with color of title." Order at 2. I disagree.

I dissent because I believe that when the record on appeal is honestly and completely reviewed, it is apparent that the trial court erred in dismissing defendant's counterclaims and striking her affirmative defenses. Accordingly, a summary judgment in favor of Mund was not appropriate because genuine issues of material fact exist as to whether Mund acquired color of title in good faith.

The standard of review on appeal from the dismissal of a complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2000)) is the same as that on an appeal from a summary judgment: whether the existence of a genuine issue of material fact should have precluded the dismissal or summary judgment or, absent such an issue of fact, whether the dismissal or judgment is proper as a matter of law. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). In either case, we review the trial court's decision *de novo*. *Hodge*, 156 Ill. 2d at 116. It is not our job

to *decide* disputed questions of fact, but only to determine whether they exist. If disputed questions of fact do exist, then a dismissal or summary judgment is inappropriate. In my view, the majority goes one step too far, deciding the disputed questions of fact raised by defendant's counterclaims and affirmative defenses. I would reverse the trial court's order of November 30, 2000, because I believe that genuine issues of material fact exist with respect to the issues in this case and that plaintiffs were not entitled to a dismissal, or a judgment in their favor, as a matter of law.

I turn first to the dismissal of defendant's counterclaims as having been filed after the expiration of the applicable statutes of limitations. With respect to count I, alleging breach of written contract, the statute of limitations for actions on written contracts is set forth in section 13-206 of the Code: all actions on written contracts must be commenced within 10 years next after the cause of action accrued. 735 ILCS 5/13-206 (West 2000). I believe that a genuine issue of fact exists as to when defendant's cause of action for breach of contract accrued. Illinois follows the "discovery rule" in determining when a period of limitation begins to run. *Vogt v. Bargelsmeyer*, 264 Ill. App. 3d 165, 173 (1994). The effect of the discovery rule is to postpone the starting of the period of limitations until the injured party knows or should have known of his injury. *Vogt*, 264 Ill. App. 3d at 173. Under the discovery rule, determining the point at which the running of the limitations period begins is a question for the trier of fact, unless the parties do not dispute the facts or only one conclusion can be drawn. *Vogt*, 264 Ill. App. 3d at 173. In the instant case, a question of fact exists

as to when defendant first became aware, or should have been aware, of her injury as a result of plaintiffs' breach of contract.

With respect to count II of defendant's counterclaim, seeking ejectment, the trial court clearly erred in dismissing on the basis of the statute of limitations. The statute of limitations applicable to actions in ejectment is found in section 13-101 of the Code (735 ILCS 5/13-101 (West 2000)). A claim for ejectment has a 20-year statute of limitations that begins to run when the property owner becomes aware of the entry by another onto his property. *Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 439-41 (1988); 735 ILCS 5/13-101 (West 2000). The record contains no allegation or evidence that plaintiffs were in possession of the subject property for more than 20 years preceding the filing of Reeves' counterclaim for ejectment. Plaintiffs were not entitled to the dismissal of count II of defendant's counterclaim on the basis of the expiration of the statute of limitations.

Finally, with respect to count III of defendant's counterclaim, alleging a violation of her civil rights under the Civil Rights Act of 1871 (42 U.S.C. § 1983 (1994)) by virtue of plaintiffs' filing the instant quiet title action, the parties agree that a two-year statute of limitations period applies. See *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). Because defendant's claim arose out of the commencement of the instant action on February 10, 2000, her counterclaim, filed July 20, 2000, was timely filed and plaintiffs were not entitled to the dismissal of this claim as a matter of law based on the statute of limitations.

The trial court also found that defendant's claims were barred by the prior decisions of the federal courts, which determined that defendant had knowledge of her claims in 1993 and they were therefore barred by the applicable statutes of limitations. The reasoning of the trial court is unclear. Nevertheless, I would reverse the dismissal of defendant's counterclaim on this ground because, even if defendant did know of her claims against plaintiffs in 1993, they would not be barred by the applicable statutes of limitations.

In its order of November 30, 2000, the trial court also found that count III, alleging a section 1983 civil rights violation, failed to state a cause of action because it failed to allege malicious abuse of process by plaintiffs. Plaintiffs' motion to dismiss was brought pursuant to section 2-619 of the Code, not section 2-615 of the Code (735 ILCS 5/2-619, 2-615 (West 2000)). Plaintiffs' motion to dismiss count III of defendant's counterclaim was based solely on the statute of limitations and did not allege or argue that it failed to state a cause of action. The trial court errs in granting a motion that has not been made. See *Crooks Terminal Warehouse, Inc. v. American National Bank & Trust Co. of Chicago*, 83 Ill. App. 3d 693, 698 (1980). To do so deprives the other party of the opportunity to defeat the motion or, in this case, to amend its pleadings to state a cause of action. See also *Tyler Enterprises of Elwood v. Skiver*, 260 Ill. App. 3d 742, 753-54 (1994). To the extent this was the basis for the trial court's dismissal of count III of defendant's counterclaim, I would reverse it.

In my opinion, plaintiffs were not entitled to the dismissal of defendant's counterclaims as a matter of law. A genuine

question of fact exists as to the timeliness of the filing of count I of the counterclaim. Neither count II nor count III were filed outside the applicable statute of limitations period. The dismissal of count III for the failure to state a cause of action was premature. Accordingly, I would reverse the dismissal of counts I through III of defendant's counterclaim against plaintiffs.

I turn now to the trial court's striking of defendant's affirmative defenses to plaintiffs' complaint. The trial court apparently struck the affirmative defenses for the same reasons its dismissed defendant's counterclaim: because they were filed beyond the applicable statute of limitations and were barred by the rulings of the federal courts as to defendant's date of discovery of her injury. The trial court erred as a matter of law. In *Westbank v. Maurer*, 276 Ill. App. 3d 553, 564 (1995), this court held that there is a well-recognized distinction between the maintenance of an original action (a counterclaim) and the assertion of a defense in response to an action filed by another (an affirmative defense). The assertion of an affirmative defense against an action brought against a defendant is not barred by the statute of limitations. *Westbank*, 276 Ill. App. 3d at 564. Accordingly, I would reverse the trial court's order striking defendant's affirmative defenses as having been filed beyond the expiration of the statute of limitations.

Finally, I turn to the summary judgment entered in favor of plaintiffs on their second amended complaint to quiet title. Because I believe that the trial court erred in dismissing and striking defendant's counterclaims and affirmative defenses, I also believe that there are genuine issues of material fact

that exist with respect to plaintiffs' claims, particularly whether their claim and color of title to Lot 7A was made in good faith. In her counterclaims and affirmative defenses, defendant alleges that Reeves' signature on the contract to buy and sell Lot 7A was obtained through fraud, as a part of a fraudulent scheme, and that plaintiffs never paid the monies due thereunder or under the collateral contract to purchase the golf course. The good faith in the creation or acquisition of color of title required by section 13-109 of the Code (adverse possession under color of title upon the payment of taxes) is a freedom from the design to defraud the person having the better title. *In re Estate of Tobin*, 176 Ill. App. 3d 580, 588 (1988). Defendant has raised a genuine issue of material fact as to whether plaintiffs' "color of title" was acquired in good faith. Accordingly, I would reverse the summary judgment entered in favor of plaintiffs on their second amended complaint.

This case is admittedly convoluted, confusing, and complicated. Defendant's pleadings are not well drafted and are difficult to follow. The case has a tortured procedural history. I can therefore understand the desire of the trial court and, apparently, the majority to dispose of this case as expeditiously as possible. Nevertheless, I believe that the trial court erred as a matter of law in dismissing and striking defendant's counterclaims and affirmative defenses and that these counterclaims and affirmative defenses raise genuine issues of material fact as to whether plaintiffs acquired color of title to Lot 7A in good faith. Accordingly, I would reverse and remand this cause for further proceedings on the pleadings.

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT FOR ST. CLAIR COUNTY, ILLINOIS DATED AND FILED NOVEMBER 30, 2000

IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

No.: 00-CH-95

LOUIS I. MUND and COLUMBIA GOLF CLUB, INC.,

Plaintiffs,

vs.

RUTH REEVES,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on to be heard this __ day of _____, 2000, on the Combined Motion to Dismiss and for Summary Judgment filed by the plaintiffs herein, and the Court having reviewed the pleadings of the parties and having listened to arguments of counsel and considered their arguments and memorandums submitted, finds as follows:

1. That on or about August 31, 1998, RUTH REEVES (inter alia) (hereinafter referred to as REEVES) filed her Amended Complaint in the United States District Court for

the Southern District of Illinois, 98-384-PER, which, in Counts IV, V and VI made certain allegations relative to the COLUMBIA GOLF CLUB of which Lot 7A is the subject matter of plaintiffs' Second Amended Complaint. A copy of the *Reeves* Amended Complaint was attached to the combined motion as Exhibit A.

2. That on January 11, 1999, the Honorable David Herndon, United States District Judge, entered judgment against REEVES (inter alia) and in favor of LOUIS I. MUND hereinafter referred to as MUND) (inter alia), a copy of the judgments and Amended Memorandum and Order being attached to the combined motion to dismiss as Exhibit B.

3. That thereafter, on January 4, 2000, the United States Court of Appeals for the Seventh Circuit affirmed the decision of Judge Herndon, by an opinion, a copy of which was attached to the combined motion as Exhibit C.

4. That on June 5, 2000 the United States Supreme Court denied REEVES' Petition for Writ of Certiorari, a copy of the denial of which was attached to the combined motion as Exhibit D.

5. That the plaintiffs in the instant action filed their Amended Complaint seeking title to Lot 7A by virtue of 735 ILCS 5/13-109 and 110 by the payment of real estate taxes through the calendar year 1998, the tax bill for which was paid when due on August 30, 1999.

6. That by virtue of said allegations, the plaintiffs' cause of action arose on August 30, 1999.

Appendix B

7. That in her Answer, the defendant REEVES admits that the plaintiffs herein have paid taxes for more than seven years, admits that the plaintiffs are in actual possession of the land, admits that demand was made on her to convey the land (which she refused), and further admits that the instant plaintiffs have no adequate remedy at law.

8. That the statements of REEVES in her deposition in Cause 94-1000-PER are judicial admissions.

9. That it is unreasonable to conclude that MRS. REEVES would wait from 1982 to 1993 and not know that something was happening with the golf course and the land that had been hers.

10. That it is unreasonable to conclude that MRS. REEVES would not know that a note on which G.R.R. Investment Company, Inc. was obligated was paid as per the checks included in Group Exhibits A and B attached to the Supplemental Affidavit of LOUIS I. MUND.

11. That Exhibit 8 attached to the defendant Timothy Reeves' Affidavit is irrelevant to the claims in the Second Amended Complaint inasmuch as the complaint had never been filed.

12. That Exhibit 9 attached to the Affidavit of Timothy Reeves is a tax bill not on Lot 7A but on Lot 4.

13. That reasonable men could not differ on the facts as set forth in the Affidavit of LOUIS I. MUND and the Supplemental Affidavit of LOUIS I. MUND as well as the

facts hereinabove set forth. Therefore, it is hereby the order of the court as follows:

1. That summary judgment on the plaintiffs' Second Amended Complaint to Quiet Title is hereby entered in favor of the plaintiffs and against the defendant in Counts I and II.

2. That the Counterclaim does not state a cause of action under § 1983, the filing of a lawsuit absent a claim of malicious abuse of process (not present under the facts as alleged) is not proper, the plaintiffs exercising a proper right they have under 735 ILCS 5/13-109 and 110.

3. That the prior decision in the United States District Court determined that REEVES had knowledge of the claims as of February 17, 1993 while the Seventh Circuit found the correct date of knowledge was March 4, 1993. Therefore the counterclaim and affirmative defenses are barred by these prior decisions under 735 ILCS 5/2-619(a)(4) and (5) in that:

a) 735 ILCS 5/13-206 establishes a 10-year statute of limitations on written contracts, and the contracts in question were entered in 1982, the statute therefore running in 1992;

b) 735 ILCS 5/13-102 establishes a 7-year statute for breach of conditions subsequent and if REEVES is claiming this section the statute would have run in 1989;

c) 735 ILCS 5/13-1005 provides a 5-year statute for actions "not otherwise provided," which would have run on either February 17, 1998 or March 4, 1998;

d) 42 USC § 1983 by case law provides a 2-year statute which would have run on either February 17, 1995 or March 4, 1995.

That in any event because the plaintiffs did not "own" their cause of action until August 30, 1999, the Counterclaim and Affirmative Defenses are barred because the statutes of limitations hereinabove enumerated barred the Counterclaim and Affirmative Defenses prior to the formation of the bases of the claims in the primary complaint pursuant to 735 ILCS 5/13-207.

4. That the Counterclaim is herein dismissed and the Affirmative Defenses herein ordered stricken.

s/ John M. Goodwin
Associate Circuit Judge

APPENDIX C — ORDER OF THE APPELLATE COURT OF ILLINOIS FOR THE FIFTH DISTRICT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 7, 2002

NO. 5-00-0841

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

LOUIS I. MUND and COLUMBIA GOLF CLUB, INC.,

Plaintiffs-Appellees,

v.

REBECCA BROWN, in her capacity as Special Representative for Ruth S. Reeves, Deceased,

Defendant-Appellant.

Appeal from the Circuit Court of St. Clair County.

No. 00-CH-95

ORDER

This cause coming to be heard on appellant's petition for rehearing, appellant's motion by interlineation, appellant's motion to take judicial notice, appellees' objection thereto, appellees' motion to impose sanctions, appellant's response thereto, and the court being advised in the premises:

Appendix C

IT IS THEREFORE ORDERED that appellant's motion by interlineation shall be and hereby is, GRANTED. Appellant's motion to take judicial notice is hereby DENIED. Appellant's petition for rehearing is hereby DENIED. Appellees' motion to impose sanctions is hereby DENIED.

APPENDIX D — ORDER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR LEAVE TO APPEAL DATED DECEMBER 5, 2002

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

94704

December 5, 2002

Mr. Paul Douglas Brown
Annamalai & Brown
11 The Pines Court, Ste. E
Creve Coeur, MO 63141

No. 94704 — Louis I. Mund et al., respondents, v. Rebecca Brown, etc., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal or appeal as a matter of right in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 27, 2002.

APPENDIX E — ORDER OF THE SUPREME COURT OF ILLINOIS DENYING MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION DATED JANUARY 16, 2003

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

January 16, 2003

Mr. Paul Douglas Brown
Annamalai & Brown
11 The Pines Court, Ste. E
Creve Coeur, MO 63141

TODAY THE FOLLOWING ORDER WAS ENTERED:

No. 94704 — Louis I. Mund et al., respondents, v. Rebecca Brown, etc., petitioner.

Motion by petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal or to appeal as of right. Motion *denied.*

Order entered by the Court.

Mandate has issued forthwith to the Appellate Court, Fifth District.

APPENDIX F — STATUTE INVOLVED

42 U.S.C. SECTION 1983

Sec. 1983. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia